NUMBER 82-6248

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

LUIS TORRES-VALENCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
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The petitioner, LUIS TORRES-VALENCIA, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, San Francisco, California (Docket No. 82-1502) filed April 7, 1983, affirming petitioner's conviction in the United States District Court, Eastern District of California, Sacramento, California.

QUESTIONS PRESENTED FOR REVIEW

1. Were the character instructions prepared by defendant's counsel proper in light of the evidence adduced at trial?

2. If the character evidence is admitted at trial, must the trial court prepare and give an appropriate instruction to the jury even in the absence of a proper character instruction prepared by defendant's counsel?

3. Does the allowance of oral argument to the jury by defense counsel on the issue of character evidence satisfy the legal and due process necessity of an appropriate jury instruction on the subject?

PARTIES TO THE PROCEEDING

The petitioner was indicted with two co-defendants whose cases were severed and who were tried separately. Accordingly, there are no parties to the proceeding other than those named in the caption to this petition.

OPINION BELOW

A copy of the opinion below from the Court of Appeals for the Ninth Circuit, No. 82-1502, April 7, 1983, is attached as Appendix I.

STATEMENT OF JURISDICTION

On April 7, 1983, the United States Court of Appeals for the Ninth Circuit in Case No. 82-1502 (Appendix I) affirmed the conviction of the petitioner in the United States District Court for the Eastern District of California, Sacramento, California.

A petition for rehearing was not filed. No extention of time to file this petition was granted.

Petitioner files this petition in forma pauperis, through his counsel of record, the Federal Defender for the Eastern District of California, who was appointed to represent the petitioner under the Criminal Justice Act. Jurisdiction of this court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION

Constitution, Amendment Five

"No person shall be . . . deprived of life, liberty or property, without due process of law . . . ."

STATEMENT OF THE CASE

Jurisdiction of the District Court

Jurisdiction of the District Court is predicated upon the allegation that the petitioner violated Title 21 U.S.C. § 846, Conspiracy to Distribute a Controlled Substance, and Title 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute a Controlled Substance.

Statement of Prior Proceedings

This case was tried before a jury with the Honorable Milton L. Schwartz, United States District Judge, Eastern District of California, presiding.

Petitioner was found guilty of violating two counts of Title 21 U.S.C. § 841(a)(1) and one count of violating Title 21 U.S.C. § 846. Petitioner was sentenced to a term of three (3) years as to each count pursuant to Title 18 U.S.C. § 4205(a). The counts charging violations of

Title 21 U.S.C. § 841(a)(1) were ordered to carry a special parole term of ten (10) years and were made to run concurrently with each other and with the term imposed in the remaining count. Petitioner has been in continuous custody and serving his sentence since the time of his conviction.

STATEMENT OF FACTS

Three out of the four defense witnesses presented at the petitioner's trial testified to the defendant's good character as a law-abiding citizen inconsistent with those traits of character ordinarily involved in the commission of the type of crime with which the defendant was charged. The defendant timely moved on two separate occasions for an appropriate character instruction to be given to the jury.

Three character instructions were tendered to the Court by the defense. One was withdrawn. One was from Devitt and Blackmar and contained superfluous material relating to reputation evidence which was not presented in the case at bar. The third instruction reads as follows:

> "Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.
>
> The jury should consider such evidence along with all other evidence in the case.
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence."

The trial court refused to give any instruction at all concerning the value that the jury could place on character evidence. The trial court did give the general instructions concerning the credibility of witnesses and examination of all of the evidence. Counsel was allowed to argue character evidence but was not allowed to argue based upon an instruction since there was no instruction given.

REASONS FOR GRANTING THIS WRIT

A. THE CHARACTER INSTRUCTION PREPARED BY DEFENDANT'S COUNSEL WAS PROPER IN LIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

At trial, character testimony was properly admitted into evidence without objection. Three separate witnesses were offered by the defense for the sole purpose of admission of character testimony. All three witnesses gave opinion testimony which is allowed by Federal Rule of Evidence 405(a). All three witnesses testified to the effect that it was their opinion that the defendant was a law-abiding citizen and that he was not the type of person who would commit the type of crime charged.

The instruction set forth in the Statement of Facts herein is clear, concise, legally accurate and appropriately tendered to the trial court. In particular, it informs the jury that character evidence alone may give rise to a reasonable doubt. The jury never heard that instruction and found the defendant guilty in its absence.

In affirming the petitioner's conviction, the Ninth Circuit said merely that the "instructions prepared by

defendant's counsel were not proper in light of the evidence adduced at trial," citing United States v. Wolosyn, 411 F.2d 550, 551 (9th Cir. 1969). Petitioner has no idea what the Ninth Circuit would have wanted changed in his evidence or in his instruction to make it proper. Wolosyn, supra, is not much help since in that case apparently there was insufficient evidence for an instruction and no objection was made at the trial court level. The factual background of the case is not stated in the opinion.

B. EVEN IF THE TRIAL COURT DID NOT FEEL THAT THE DEFENSE TENDERED AN APPROPRIATE CHARACTER INSTRUCTION, THE TRIAL COURT HAD A DUTY TO FASHION AND GIVE AN APPROPRIATE INSTRUCTION ONCE CHARACTER EVIDENCE HAD BEEN PROPERLY ADMITTED AND AN INSTRUCTION WAS REQUESTED.

As appropriately stated in Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945):

> "It is true that it has been held in connection with instructions to the jury that it is the duty of the court to cover the issues involved even in the absence of request."

C. WHEN CHARACTER EVIDENCE IS NOT MENTIONED IN ANY GIVEN JURY INSTRUCTION, THE GENERAL INSTRUCTIONS ON THE CREDIBILITY OF WITNESSES AND ORAL ARGUMENT DO NOT SATISFY THE DUE PROCESS REQUIREMENT OF AN APPROPRIATE INSTRUCTION ON THE SUBJECT.

The Ninth Circuit cited Michelson v. United States, 335 U.S. 469, 476 (1948), and Edgington v. United States, 164 U.S. 361 (1892), for the proposition that "the instructions given by the Court allowed the defendant to sufficiently argue his theory of the case." Neither case supports the proposition. The Michelson case, supra, has absolutely nothing to do with either instructions or oral argument.

The Edgington case, supra, stands for the exact opposite of the reason that it was cited. There must be a character instruction when character evidence has been admitted.

It was never an issue on appeal that the defendant was not allowed to argue. The issue was and is the failure of the trial court to give a proper instruction to the jury so that they could know how to appropriately dispose of their duties. The jury does not get their instructions on the law from oral argument, they get it from the court. No case has been found nor ever will be found (except the case at bar) where oral argument takes the place of proper instructions.

CONCLUSION

Even though the opinion below substantially changes the law in two major areas, it was not even elevated to a published opinion. The opinion below alleviates the trial court from the duty of fashioning an appropriate instruction on request when character evidence is before it. The opinion below allows general instructions on evidence and oral argument to take the place of specific requested instructions on properly admitted character evidence. The petitioner appreciates the fact that this Honorable Court must have thousands of these peititions presented to it each month. All that the petitioner asks is that the Court take a good hard look at the injustice which occurred in the case at bar and in finding that the petitioner has been treated unfairly, grant this petition.

For the foregoing reasons, petitioner prays that his petition for this Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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APR 8 1983

FILED

APR 7 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS TORRES-VALENCIA, Defendant-Appellant.	NO. 82-1502 D.C. No. Cr. S-81-81 MLS MEMORANDUM

Argued and Submitted -- March 17, 1983

Appeal from the United States District Court
for the Eastern District of California
Honorable Milton L. Schwartz, District Judge, Presiding

Before: Hug and Farris, Circuit Judges, and
Irving, District Judge*

Torres-Valencia appeals from his conviction of conspiracy to distribute, and possession of heroin. Defendant argues the District Court erred in refusing to give a character evidence jury instruction. The instructions prepared by defendant's counsel were not proper in light of the evidence adduced at trial. United States v. Wolosyn, 411 F.2d 550, 551 (9th Cir. 1969). Further, the instructions given by the Court allowed

*The Honorable J. Lawrence Irving, United States District Judge from the Southern District of California, sitting by designation.

defendant to sufficiently argue his theory of the case. Michelson v. United States, 335 U.S. 469, 476 (1948); Edington v. United States, 164 U.S. 361 (1892).

Therefore, the Court finds no error, and the judgment of the District Court is AFFIRMED.

NUMBER 82-6848

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

LUIS TORRES-VALENCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, LUIS TORRES-VALENCIA, pursuant to Rule 46(1), Supreme Court Rules, and Title 18 U.S.C. § 3006A(d)(6), asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis.

Petitioner qualified for appointment of counsel under the Criminal Justice Act and the Federal Defender for the Eastern District of California was appointed to represent him in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit. The Federal Defender has represented petitioner at all stages of the

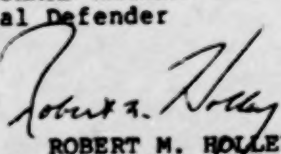
appeal proceedings against him and is continuing to represent him under the Criminal Justice Act. Petitioner continued to qualify for appointment of counsel under the Criminal Justice Act.

It is therefore respectfully requested that petitioner be allowed to proceed in forma pauperis.

DATED: May 26, 1983

Respectfully submitted,

E. RICHARD WALKER
Federal Defender

By 
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No. 82-6848

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LUIS TORRES-VALENCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in declining to give petitioner's proposed instruction on character witness testimony, and, if so, whether the error was harmless beyond a reasonable doubt.

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1983. The petition for a writ of certiorari was filed on May 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted on one count of conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846 (Count 1), and two counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 2 and 4). He was

sentenced to concurrent terms of three years' imprisonment on each count, to be followed by a five-year special parole term on Counts 2 and 4. The court of appeals affirmed (Pet. App. 1-2).

1. The evidence at trial showed that on April 14, 1982, DEA Agent Antonio Loya arranged a meeting in San Jose, California, between an informant equipped with a body transmitter and two sellers of heroin, Carlos Rojas and Gevardo Flore-Macias (Tr. 17-20). During the conversation, one seller said that they were selling heroin at $13,000 an ounce. The other seller explained that a third person was the source of the drug, but he assured the informant that he could provide whatever quantity of heroin the informant needed (Tr. 120-122).

The next day, Agent Loya, posing as a heroin dealer, met with the informant, Rojas and Flores-Macias at the informant's motel room in West Sacramento (Tr. 27-28). The agent indicated that he wanted to buy 8 to 10 ounces of heroin and offered $1000 to cover the sellers' travel expenses. Flores-Macias agreed to travel to Los Angeles to pick up the heroin from his source, and then return with it (Tr. 29-30).

On April 20, two DEA agents saw petitioner and Flores-Macias drive a Ford Granada into a parking lot near the informant's motel where they met with Rojas who was driving a red pick up truck (Tr. 131-132). Thereafter, while petitioner and Rojas waited in Rojas' truck, Flores-Macias entered the Ford Granada briefly and then walked across the street to the informant's room (Tr. 133-134). After Flores-Macias left the motel, the informant showed a DEA agent the sample of heroin he had just received (Tr. 32-33).

Later that afternoon, petitioner drove the Ford Granada to a nearby residential area where he opened the back door and appeared to be "rearranging something behind the driver's seat" (Tr. 140). Petitioner then returned to the motel and went into Rojas' room, which was adjacent to the informant's (Tr. 139-

141). Within a few minutes, Flores-Macias, carrying a paper bag, entered the informant's room (Tr. 186-187). The informant and Flores-Macias then walked to a nearby parking lot to deliver the remaining heroin--five ounces--to Agent Loya (Tr. 142, 187). Petitioner was arrested shortly thereafter in Rojas' motel room (Tr. 188).

2. Petitioner testified in his own defense and admitted driving his car to the motel where the heroin sale took place, but denied being involved in any narcotics transaction (Tr. 258). Petitioner also presented three friends as character witnesses. All three witnesses testified without objection that they had never known petitioner to use any drugs or narcotics, or to talk about the sale of narcotics. In addition, they stated that to their knowledge petitioner had not committed any crimes; nor was he the "type of person" who would be involved in selling heroin (Tr. 231-234, 240-242, 293-297).

Prior to closing arguments, appellant submitted two proposed character witness instructions. The district court rejected both of them because they were "keyed to evidence of reputation for certain character traits * * * [and] there was no reputation evidence offered" (Tr. 322). Petitioner then offered the following proposed instruction (Tr. 324-325):

> Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character in respect to those traits would commit such a crime.
>
> The jury should consider such evidence along with all other evidence in the case.
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The district court rejected the instruction because "[c]haracter evidence was not offered in a form that would be receivable. * * * All that was offered was [sic] the opinions of, as I

recall, two or three witnesses who said that they knew him to be a law abiding citizen, in their opinion, and not the kind of person who would commit a crime as the one charged here. * * * I don't feel that a character evidence instruction is appropriate under these circumstances" (Tr. 326). Since the evidence had been admitted, however, the court allowed petitioner's counsel in closing argument to argue that the character witness testimony could create a reasonable doubt as to whether petitioner committed the crimes charged (Tr. 326, 387).

The court of appeals affirmed (Pet. App. 1-2). It held that petitioner's instructions were not proper in light of the evidence adduced at trial and that the disrict court's failure to give the specific instruction had not precluded petitioner from presenting his theory to the jury (ibid.).

ARGUMENT

Petitioner contends (Pet. 5-7) that the district court improperly refused to give his requested instruction on character evidence and that such an error was not harmless. In the circumstances of this case, however, the court of appeals properly found that the failure to give the instruction was harmless error.

It is well-settled that evidence of good character can create a reasonable doubt as to whether the defendant committed a crime. See 2 Weinstein, Evidence 1981 ¶ 404 [05]; Michaelson v. United States, 335 U.S. 469 (1948); Edgington v. United States, 164 U.S. 361, 366 (1896). In addition, contrary to the district court's conclusion, character evidence may now be offered in the form of an opinion, as well as by testimony regarding the defendant's reputation in the community. See Fed. R. Evid. 405; 2 Weinstein, supra, at ¶ 405 [03]. Accordingly, petitioner's evidence was admissible. Since petitioner's proposed instruction correctly stated the rule of law and there was admissible character evidence, petitioner was entitled to have his proposed

instruction given. See United States v. Cramer, 447 F.2d 210, 219 (2d Cir. 1971), cert. denied, 404 U.S. 1024 (1972).

Nevertheless, in the circumstances of this case, the court's error was inconsequential. According to government agents, petitioner arrived at the informant's motel with Rojas and Flores-Macias, who had promised the informant that they would get the heroin from their source. Flores-Macias retrieved a heroin sample from the same Ford Granada that petitioner had driven both to the motel and to a residential area nearby. Within minutes of petitioner's return to the motel room, Flores-Macias delivered a paper sack of heroin to the informant. Petitioner testified that he only drove to Rojas' room seeking a loan and never left the room to drive the Granada. Thus, the crucial issue in the case was who--petitioner or the agents--was telling the truth. The jury obviously credited the agents' testimony.

Moreover, the court permitted petitioner to argue that the evidence regarding his good character by itself could be enough to create a reasonable doubt, and petitioner's counsel emphasized that as a basis for acquittal (Tr. 387-388). The district court instructed the jury that it should carefully examine all the testimony, that it should draw any reasonable inferences it felt were justified in the light of experience, and, of course, that the government had to prove petitioner's guilt beyond a reasonable doubt (Tr. 455-457). Accordingly, it is reasonable to assume that the jury simply was not persuaded by petitioner's very general character evidence. In these circumstances, the failure to give a specific character evidence instruction was harmless. Compare United States v. Cramer, supra, 447 F.2d at 219. See also Connecticut v. Johnson, No. 81-927 (February 23, 1983) slip op. 8; Chapman v. California, 386 U.S. 18, 24 (1967). In any event, the issue was considered by the court of appeals, and will affect no one except petitioner. It therefore does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Assistant Attorney General

JANIS KOCKRITZ
Attorney

AUGUST 1983